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No. 92-1305

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

DOUGHBOY RECREATIONAL, INC., A Division of Hoffinger Industries, Inc.,

Petitioner,

v.

RICHARD FLECK, DIANE FLECK, Nichols Swim Pools, Inc., James Hubert, KDI Sylvan Pools, Inc., Poseidon Pools of America, The Gibraltar Corp., and S & V Pools, Inc.,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT, NICHOLS SWIM POOLS, INC.

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STATEMENT OF THE CASE

As set forth in Hoffinger's Petition, this is a products liability case arising from personal injuries suffered by Plaintiff, Richard Fleck, when he dove into an above-ground swimming pool on August 8, 1987, injuring his vertebrae and rendering him a quadriplegic. Plaintiff

instituted this action against James Hubert, the owner of the pool where the accident took place, KDI Sylvan Pools (hereafter referred to as "KDI"), the distributor of the pool, and Respondent, Nichols Swim Pools Inc., (hereafter referred to as "Nichols Pools"), the distributor of a replacement liner that was in place in the pool at the time of the accident. In pleadings and at trial, Plaintiff proceeded against Nichols Pools solely on a strict liability theory, predicated on §402 of the Restatement of Torts (Second). Nichols Pools joined the manufacturer of the pool liner, Doughboy Recreational, Inc., a division of Hoffinger Industries, Inc. (hereafter referred to as "Hoffinger"), as a third party defendant. KDI joined the pool manufacturers (hereafter referred to as "pool defendants") as third party defendants.

During trial, the District Court directed a verdict in favor of KDI and the other pool defendants and against all parties, citing the Statute of Repose and other unspecified reasons. 1253a-1256a. In addition, the District Court directed a verdict in favor of Nichols Pools and against Hoffinger on Nichols Pools' claim for indemnity. Hoffinger did not oppose this directed verdict and does not challenge the propriety of the directed verdict before this court.

At the conclusion of the liability phase of the bifurcated trial, the jury found that plaintiff's causal negligence exceeded that of James Hubert, and accordingly, found in favor of Mr. Hubert. The jury further found that the pool liner was defective and that the defect was a substantial cause of plaintiff's injuries, and thus found in favor of plaintiff and against Nichols Pools. Nichols Pools subsequently settled with plaintiff and has sought to have its indemnity judgement satisfied by Hoffinger.

The United States Court of Appeals for the Third Circuit upheld the verdict in favor of plaintiff and against Nichols Pools, as well as the directed verdict in favor of Nichols Pools and against Hoffinger. The Court of Appeals also upheld the directed verdict in favor of KDI and against plaintiff. Hoffinger now petitions this

Honorable Court for Writ of Certiorari, challenging the verdict entered in favor of plaintiff and against Nichols Pools.

SUMMARY OF THE ARGUMENT

Hoffinger does not challenge the constitutionality of Pennsylvania law, but contends that the District Court and the Court of Appeals have violated Hoffinger's constitutional rights through various holdings at trial and on appeal. In addition, Hoffinger argues that the holdings of the District Court and the Court of Appeals are contrary to controlling Pennsylvania precedent. As set forth below, these arguments are frivolous and uniformly without merit. Furthermore, Hoffinger did not raise its alleged constitutional violations before either the District Court or the Court of Appeals, and accordingly, has waived those arguments. In addition, in its Petition, Hoffinger misrepresents the testimony which supports the jury's verdict against Nichols Pools and Hoffinger in this matter. Nichols Pools addresses each of those questions presented by Hoffinger for review.[1]

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1. Plaintiffs, Richard Fleck and Diane Fleck, join in the Brief of Nichols Swim Pools, Inc. and adopt the arguments therein.

ARGUMENT

I. HOFFINGER'S FIFTH AMENDMENT RIGHT TO DUE PROCESS WAS NOT VIOLATED BY THE JURY'S VERDICT BASED ON THE AMPLE EVIDENCE THAT THE LACK OF WARNINGS ON THE REPLACEMENT POOL LINER WAS A SUBSTANTIAL CAUSE OF MR. FLECK'S INJURIES

A. Hoffinger Did Not Raise The Alleged Violation Of Its Fifth Amendment Rights In Its Post Trial Motions Or Before The Court of Appeals And Therefore Has Waived This Argument.

In its Petition for Writ of Certiorari, Hoffinger presents three questions for review based on alleged violations of Hoffinger's constitutional rights. Hoffinger claims its right to both due process and equal protection under the Fifth Amendment of the United States Constitution, and Seventh Amendment right to trial by jury were all violated by the District Court. However, Hoffinger did not raise any of these constitutional arguments in its Post-Trial Motions to the District Court or on appeal to the Third Circuit. Accordingly, Hoffinger has waived the alleged violation of its constitutional rights presented in Questions I, II, and III of its Petition for Writ of Certiorari. "Our normal practice, from which we see no reason to depart on this occasion, is to refrain from addressing issues not raised in the Court of Appeals." *E.E.O.C. v. Federal Labor Relations Authority,* 106 S.Ct. 1678, 1681, 476 U.S. 19, 90 L.Ed. 2d 19 (1986) *See also, F.T.C. v. Grolier, Inc.,* 462 U.S. 19, 23 n.6, 103 S.Ct. 2209, 76 L.Ed. 2d 387(1983) (Respondent did not raise issue before the District Court or the Court of Appeals and Supreme Court declined to address it), *Rogers v. Lodge,* 458 U.S. 613, 628 n.10, 102 S.Ct. 3272, 73 L.Ed. 2d 1012 (1982) (Argument not properly raised in Court of Appeals would not be addressed by Supreme

Court). Based on the clear law set forth above, Hoffinger has waived its alleged constitutional violations.

B. The Jury Verdict Did Not Violate The Fifth Amendment Of The United States Constitution Because There Was Ample Evidence Of Causation To Support Verdict.

Hoffinger contends that there was no evidence of causation between the defective warnings of the liner and Mr. Fleck's injury, and therefore, the finding of liability against Hoffinger violates Hoffinger's Fifth Amendment right to due process. Interestingly, Hoffinger does not cite any cases in which a jury's verdict in a product's liability action violated a defendant's rights to due process. The due process rights of the defendants in the cases cited by Hoffinger were all violated in either criminal, or quasi-criminal actions such as alien deportation or school disciplinary proceedings. Not one case cited by Hoffinger is evenly remotely similar to the product's liability action tried by the District Court.

Even if a verdict by the jury can violate a defendant's constitutional rights in a civil suit, there was sufficient evidence of causation to support the verdict. At time of trial, plaintiff, Richard Fleck, testified that prior to diving into the pool he looked at both the deck and the pool itself. Based on his view of the pool, he believed it was over six feet deep and that if he had known the actual depth of the pool as 3½ feet deep, he would not have dived. 524a-527a.

Clearly there was sufficient evidence to create an issue of fact for the jury that the lack of any warnings was a substantial factor in causing Richard Fleck's injuries. Furthermore, Hoffinger ignores one of the arguments put forth by plaintiff at time of trial that the liner itself should have been made in contrasting colors which would haven given Mr. Fleck some reference as to the depth of the water. 620a. Mr. Fleck testified that he did look at the bottom of the pool, and accordingly

would have seen any warning signs or contrasting colors had they been there. Clearly, sufficient evidence was presented at time of trial for the jury to conclude that the defective condition of the liner was a substantial cause of Mr. Fleck's injuries. Therefore, the verdict cannot be said to be so unfair as to deprive Hoffinger of its constitutional right to due process.

II. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DID NOT VIOLATE HOFFINGER'S RIGHT TO EQUAL PROTECTION.

A. Hoffinger Has Waived Its Equal Protection Argument.

As set forth in Argument I, Hoffinger did not previously raise any constitutional violations in its Post Trial motions to the District Court or on appeal to the Third Circuit. Accordingly, under *E.E.O.C. v. Federal Labor Relations Authority, supra,* Hoffinger has waived these arguments.

B. Hoffinger's Right To Equal Protection Was Not Violated.

Hoffinger contends that the Court of Appeals' decision treats similarly situated manufacturers of swimming pool component parts differently, and accordingly, violates Hoffinger's right to equal protection under the due process provision of the Fifth Amendment. In support of this position, Hoffinger cites the decision of the Pennsylvania Superior Court in *Matusky v. Haugh's Pools,* 610 A.2d 474 (Pa. Super. 1992). In *Matusky,* the Superior Court upheld the trial court's order granting Summary Judgment for the manufacturer, distributor and seller of the pool. The Court held that the plaintiff assumed the risk of his injuries because he was familiar with the pool, had used it on prior occasions, knew that the depth of the pool was four feet deep, and that the

water line was somewhere between plaintiff's naval and waist. *Id.* at 476.

In the case at hand, Mr. Fleck had not used the pool on previous occasions, and was not aware of the actual depth of the pool. Mr. Fleck testified that based on his view of the pool he believed, inaccurately, that the pool was over six feet deep. Because Mr. Fleck was not aware of the actual depth of the pool, the jury properly found that Mr. Fleck did not assume the risk of diving into the pool. Accordingly, the *Matusky* decision is inapplicable to the facts of the present matter.

Hoffinger argues that the law should not differentiate between those individuals who act with subjective knowledge of a specific risk and those individuals who act without such knowledge. However, this is not the law in the Commonwealth of Pennsylvania, or any other state that has adopted the defense of "assumption of the risk" in strict liability cases. While Hoffinger may take issue with the result of this defense, its application does not violate Hoffinger's right to equal protection.

Hoffinger inaccurately claims that "the Third Circuit held that despite the fact that a danger is open and obvious, there is a duty to warn individuals who are subjectively careless and unreasonable when they misjudge the depth of the water of admittedly unknown depth." This clearly misstates the position of the Third Circuit. At no time did the Court hold that the danger of diving into this pool was open and obvious. To the contrary, the Third Circuit specifically stated "[t]he danger was not open and obvious; so the product was defective, and there was a duty to warn." *Fleck v. KDI Sylvan Pools,* 981 F.2d. 107, 120 (3d. Cir. 1992).

III. HOFFINGER'S SEVENTH AMENDMENT RIGHT TO TRIAL BY JURY WAS NOT VIOLATED.

A. Hoffinger Has Waived This Argument.

As with arguments I and II, Hoffinger has not previously raised the alleged violation of its right to jury

trial in its Post-Trial motions or on appeal to the Third Circuit. Accordingly, under *E.E.O.C. v. Federal Labor Relations Authority, supra,* Hoffinger has waived this alleged constitutional violation.

B. The District Court Did Not Violate Hoffinger's Seventh Amendment Right To Trial By Jury

Hoffinger contends that the District Court violated Hoffinger's Seventh Amendment right to trial by jury by failing to instruct the jury as to whether the pool deck built around the pool was an intervening superseding cause of Mr. Fleck's injuries. Even if the District Court's instructions were in error, that jury instruction is not tantamount to a violation of Hoffinger's Seventh Amendment right.

Hoffinger correctly states that there is a right to trial by jury for damages involving personal injuries and that a litigant is entitled to have the jury instructed as to any defenses or theories of law if supported by evidence and brought to the attention of the Court. However, Hoffinger has not provided any case law to support its position that the failure by the trial judge to instruct the jury on a particular point violates a defendant's Seventh Amendment right. It is obvious from the record that Hoffinger was not denied its right to a trial by jury, and that this one particular issue was not submitted to the jury. If Hoffinger's argument is accepted by this Court, all defective jury instructions would result in a Seventh Amendment violation. Hoffinger has not provided any cases to support this peculiar position because none exists.

C. The Trial Court Was Correct In Not Instructing The Jury On The Theory Of Intervening Superseding Cause

The District Court was correct in not instructing the jury on the issue of intervening superseding cause, because the facts of the case did not warrant it. The case

law is clear that "only where the third party's action is 'so extraordinary as to not have been reasonably foreseeable' might such action constitute a superseding cause." *Van Buskirk v. Carey Canadian Mines,* 760 F.2d 481, 495 (3d. Cir. 1985) (citation omitted). In the case at hand, there was ample testimony at the time of trial to support plaintiff's assertion that the construction of the deck around the pool was foreseeable. Plaintiff demonstrated this, in part, by using Hoffinger's own advertisements showing pools with whole or partial decks added to the perimeter of the pool. Accordingly, the District Court properly did not instruct the jury as to intervening superseding cause. As such, there can be no violation of Hoffinger's Seventh Amendment right by the District Court's instructions.

Furthermore, Hoffinger misstates the District Court's holding in its Petition for Writ of Certiorari. Hoffinger contends that "Judge Buckwalter, on page 11 of his 12/06/91 Memorandum and Order Denying Post-Judgment Motions ruled that the construction of the deck by Hubert was, as a matter of law, an unforeseeable intervening cause which operated to exonerate the pool defendants. On these facts, Hoffinger contends that the District Court's refusal to instruct on this issue deprived Hoffinger of its Seventh Amendment right to trial by jury."

Hoffinger's Petition misrepresents the Court's Order. In fact, the District Court held that the record is clear that Hoffinger waived any objection it might have had to the Motion for Directed Verdict on behalf of KDI. 2450a. The court went on to state that the evidence or lack of evidence submitted by plaintiff in the case "supports the conclusion that this was an entirely different pool complex than what left the manufacturer some 15 years before the accident as a simple above ground pool." KDI had motioned the Court for a directed verdict on seven separate grounds, including the Statute of Repose. 2339a. At no point did the Trial Court hold that

the pool deck was, as a matter of law, a superseding intervening cause of plaintiff's injuries.

IV. THE VERDICT WAS BASED ON A LEGALLY SUPPORTABLE CLAIM

Hoffinger contends that the liability verdict in favor of the Flecks and against Nichols Pools should be set aside because it is not possible to determine whether the jury's verdict rested on a legally supported claim. In support of its arguments, Hoffinger claims that Mr. Fleck testified that he did not know the depth of the water of the pool, but that he knew that he should not dive into a pool of unknown depth. Because the danger was known to Mr. Fleck, there is no duty on Hoffinger's part to provide "no diving" warnings. Again, counsel for Hoffinger misstates the trial testimony. Mr. Fleck testified that he believed the true depth of the pool was over six feet deep. 524a. Mr. Fleck testified that if he had known there was only 3½ feet of water, and had there been a warning sign to that affect, he would not have dived into the pool. 527a. Tragically, Mr. Fleck was wrong in his assessment of the depth of the water. However, this is not the same as Hoffinger's assertion that Mr. Fleck had a subjective awareness of the danger diving into this pool. Clearly, the jury's verdict of liability against Nichols Pools is amply supported by the record.

V. THE THIRD CIRCUIT'S HOLDING THAT THE MANUFACTURER OF A REPLACEMENT LINER HAS A DUTY TO WARN POTENTIAL USERS OF THE DANGERS ASSOCIATED WITH THAT PRODUCT, IS CONSISTENT WITH CONTROLLING PENNSYLVANIA LAW

Hoffinger argues that under Pennsylvania law, a manufacturer of a replacement pool liner owes no duty to potential users of that product to warn of the dangers associated with the use of the product. Hoffinger contends that the Third Circuit's opinion is contrary to

controlling Pennsylvania precedent and that this Court should grant Certiorari in order to correct the Third Circuit's error. However, the Third Circuit has correctly stated Pennsylvania law.

Pennsylvania law has long held that a manufacturer's failure to warn of a latent danger in the use or operation of the product can render a properly designed product unreasonably dangerous and defective for purposes of strict product's liability. (See *Restatement of Torts,* (Second) §402A). The exception cited by Hoffinger in *Jacobini* is clearly distinguishable from the facts of the present case. *Jacobini v. V & O Press Co.,* 588 A.2d 476 (Pa. 1991). The court in Jacobini had held that the facts of the case did not require the court to submit to the jury the question of the manufacturer's duty to warn, "on the basis that the evidentiary record was simply not sufficient to support submission of a 'failure to warn' theory to the jury." (*Id.* at 478). Nevertheless, in dicta, the Court did agree that there are limits on the manufacturer's duty to warn where:

> the manufacturer supplies a mere component of a final product that is assembled by another party and dangers are associated with the use of the finished product . . . *this is particularly true where the component itself is not dangerous, and where the danger arises from the manner in which the component is utilized by the assembler of the final product,* this being a matter over which the component manufacturer has no control.

Id. at 479 (Citations omitted, emphasis supplied).

The Third Circuit properly held that the limitations on a manufacturer's duty to warn were inapplicable to the present facts. The Court in *Jacobini* explained that the manufacturer of a die set "cannot be expected to foresee every possible risk that might be associated with use of a completed product, the die, which is manufactured by another party, and warn of dangers in using that completed product in yet another party's finished

product, the power press." *Id* at 480. The Third Circuit held that the facts of *Jacobini* are clearly distinguishable from the facts in the case at hand. Unlike the die set, Hoffinger did not manufacture a mere component of a final product, but manufactured a replacement liner that was sold to the consumer in the same condition in which it left Hoffinger. The dangers which were associated with Hoffinger's pool liner existed at the time the liner left Hoffinger's hands.

Accordingly, the Third Circuit's decision was consistent with Pennsylvania law because the limitations set forth in *Jacobini* are inapplicable to the facts in the present matter.

VI. THE DISTRICT COURT AND THE COURT OF APPEALS WERE CORRECT NOT TO EXTEND THE STATUTE OF REPOSE TO THE SELLER AND MANUFACTURER OF THE REPLACEMENT LINER

Hoffinger next argues that the District Court and Court of Appeals erred in not extending the benefits of the Statute of Repose to the pool liner defendants. This statutory provision provides an exemption from liability as follows:

§5536. Construction Projects

> (a) General rule.—Except as provided in subsection (b), a civil action or proceeding brought against any person lawfully performing or furnishing the design, planning, supervision or observation of construction, or construction of any improvement to real property *must be commenced with 12 years after completion of construction of such improvement to recover damages for:*
>
> > (1) Any deficiency in the design, planning, supervision or observation of construction or construction of the improvement.

* * * *

> (3) Injury to the person or for wrongful death arising out of any such deficiency.

42 Pa.C.S.A. §5536 (emphasis supplied).

Assuming, arguendo, that the Statute of Repose even applies to the manufacturer or distributor of a replacement pool liner, the length of time between the sale of this product and commencement of plaintiff's lawsuit is clearly well short of the time period required by the statute. According to the testimony presented at trial, a replacement liner was sold to Jerry Jolly, the previous homeowner, by Nichols Pools, in 1983. This liner developed leaks and was replaced in the Spring of 1984. Plaintiff's injuries occurred on August 8, 1987, and suit was initiated in 1989. The time period between the sale of the second replacement liner and commencement of Mr. Fleck's action was five years, well short of the twelve year statutory period required by §5536.

Hoffinger argues that the statutory period for its replacement liner should actually begin at the moment of the sale of the original pool. In support of this position, Hoffinger cites the case of *Black v. Henry Pratt,* 778 F.2d 1278 (7th Cir. 1985). In *Black,* the Seventh Circuit interpreted Indiana's Product Liability Act and held that the Statute of Limitations in tort for the sale of a replacement part began running with the sale of the original product. However, the Court in *Black* clearly stated that this extension of the Indiana statute applies only when the replacement part is non-defective in and of itself. Id. at 1248. In *Black,* the only allegation that the replacement part contributed to the defect was that it allowed the final product to work. As previously stated, the Jury in the instant matter found that the liner itself was defective. While it is obvious that the liner needed the other parts of the swimming pool in order to operate, the answer to Jury Interrogatory No. 6 clearly reflects that the Jury found that the replacement liner itself was defective and lacked sufficient warnings to make the

product safe. Furthermore, the Seventh Circuit applied an Indiana statute which has no bearing in this case.

Hoffinger also cites the case of *Hinds v. Compair Kellogg,* 776 F.Supp 1102 (E.D. Va 1991). In *Hinds,* the court also applied the Indiana Statute of Repose. Presumably, Hoffinger contends that this Court should grant Certiorari because the Third Circuit's opinion is contrary to controlling Pennsylvania precedent. However, Hoffinger cites two cases, both interpreting Indiana's Product Liability Act. In fact, Hoffinger does not cite any Pennsylvania cases to support its position. As there is no question that Pennsylvania law is controlling, Hoffinger's omission is curious.

Based on the unambiguous language of Pennsylvania's Statute of Repose, it is clear that the District Court and Court of Appeals were correct not to extend the statute to Hoffinger.

CONCLUSION

Hoffinger has not presented any compelling reason why this Court should grant Certiorari to consider the questions raised therein. Hoffinger did not offer either the District Court or the Court of Appeals an opportunity to review the constitutional questions presented in Questions I, II, and III, and has therefore waived those issues. Furthermore, none of Hoffinger's arguments are supported by the facts set forth in the record nor in the applicable constitutional or Pennsylvania law. Therefore, Nichols Pools submits that this Court should deny Hoffinger's Petition for Writ Of Certiorari.

Respectfully submitted,

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